

MARY B. KIRBY.

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APRIL 8, 1880.—Committed to the Committee of the Whole House and ordered to be printed.

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Mr. CABELL, from the Committee on Pensions, submitted the following

REPORT:

[To accompany bill H. R. 5699.]

*The Committee on Pensions, to whom was referred the petition for relief of Mary B. Kirby, widow of Reynold Marvin Kirby, brevet major First Regiment United States Artillery, who died, while in line of duty, from disease contracted in the service, having had the same under consideration, respectfully submit the following report (accompanied by a bill, the passage of which they recommend):*

It is in evidence that the said Major Kirby, husband of the petitioner, was a distinguished officer of the United States Army. The records of the War Department, and other evidence before the committee, show that on the 18th day of April, 1812, he was commissioned by Governor Elbridge Gerry, of Massachusetts, as a lieutenant in a regiment of the Second Brigade, Ninth Division of Massachusetts Militia. That on the 9th day of July, 1813, he was commissioned by the President a third lieutenant in the Third Regiment United States Artillery. That on the 1st of October, 1813, he was commissioned a second lieutenant in the same regiment, and on the 15th of August, 1814, he was brevetted first lieutenant for "gallant and meritorious conduct during the siege of Fort Erie." That on the 17th of September, 1814, he was brevetted captain for "his gallantry and good conduct in the sortie from Fort Erie." That in the "peace establishment of 1815" he was retained as second lieutenant in the Corps of Artillery. That on April 29, 1816, he was appointed assistant adjutant-general, with brevet rank of major, and assigned to duty on the staff of General Brown, at Sacket's Harbor, N. Y., and thence transferred to staff of General Ripley, commanding Division of the South, and thence, on 7th January, 1818, transferred to staff of General Macomb, at Detroit, Mich., commanding Division of the North.

The office of assistant adjutant-general of the Army having been abolished at the reduction of the Army in 1821, he was assigned to the First Artillery as a first lieutenant, to rank as such from March 23, 1818, being the rank to which he would have succeeded by regular promotion in the Corps of Artillery. That on 5th of August, 1824, he was commissioned a captain in First Regiment United States Artillery, and on the 17th of September, 1824, promoted to brevet major for "ten years' faithful service."

It is also in evidence that Major Kirby participated in many engagements which shed luster upon his character as a brave and gallant soldier, among which were the battle near Cornwall, Canada, on the 11th of November, 1813; the battle of Chippewa, 1814; the battle of Lundy's

Lane, July 25, 1814; and the siege of Fort Erie, in 1814, where, as an aid to General Ripley, "he received him in his arms when he fell wounded, and was twice brevetted for gallant service during that siege."

It is also in evidence that he commanded the United States troops sent from Fortress Monroe to suppress the negro insurrection in Southampton County, Virginia, in the year 1832, under the negro leader Nat. Turner, and in the same year he was with General Scott in Charleston, S. C., in defense of the government during the nullification excitement; that in the years 1836, 1837, and 1838 he was actively engaged in the Florida war with the Seminole Indians, during which service he contracted a disease which terminated his life. From May to August, 1838, under General Scott, he took part in the removal of the Cherokee Indians. After this service he was transferred with his command to the northeastern frontier, where he was intrusted with important and delicate duties relating to the correspondence between the American and British authorities during the "Maine boundary-line" dispute with Great Britain, and for the manner in which he discharged this duty was complimented by General Scott in general orders. It is in evidence that he was afterwards transferred to the command of Fort Sullivan, near Eastport, Me., where, on the 7th day of October, 1842, he died of pleurisy, the result of his service in the Florida war.

Although from the death of Surgeon Wharton, who attended him in Florida, and also the deaths of Surgeons Sprague and McPhail, who subsequently attended him, it is made impossible to obtain the customary medical certificate, yet it is the opinion of the committee, from the evidence submitted, that his death was the result of disease contracted in the line of duty while in the military service of the government.

The evidence submitted establishing this fact is as follows, to wit:

1. Affidavit of Catharine Russell, of the town of Palatka, county of Putnam, State of Florida, who, qualifying before the county judge of said county, with the seal of his court affixed, swears that she was well acquainted with the husband of the petitioner during the Seminole war in that State; that in 1836 he was relieved from active duty in the field, in consequence of a severe attack of fever contracted in the swamps; that his sickness was long and severe; that she personally attended him during his illness, and that her personal knowledge of him continued therefrom and to the day of his death; and that she has reason to know from personal knowledge that he never recovered from said illness.

2. Affidavit of Frances M. Webster, of York, county of York, State of Pennsylvania, who swears that she is the widow of the late Col. L. B. Webster, of the United States Army; that she was a resident of Saint Augustine during the Florida war with the Seminoles; that she was personally acquainted with the late Maj. Reynold M. Kirby, of the First Regiment United States Artillery; that in the year 1836, while on active duty, the said Reynold M. Kirby was, by reason of sickness, relieved from duty in the field and retired to Saint Augustine, and was under medical treatment at the house of her father, Judge J. L. Smith. The health of Reynold M. Kirby was greatly impaired by his exposure and illness as above stated, and caused his death.

3. Affidavit of George R. Peake, of Kansas City, Mo., who, under seal of a notary public, swears that he was for a long period of time personally acquainted with the late Major Kirby; that he served his country faithfully in the Indian wars in Florida, and there impaired his health by disease contracted in the swamps, and in this condition was ordered to Eastport, Me., where his health was completely sapped by the sudden transfer from the glades of Florida to the colder latitude of Maine, where

he died in the prime of life, aged 52 years, as he unquestionably believes from devotion to the service of his country and in obedience to the orders of his superiors in command.

4. Affidavits of G. E. Hawes and E. S. Crill, who, under the seal of the county court of Putnam County, Florida, having been sworn by the judge of said court, swear that they are medical practitioners of the State of Florida, and have been such, the former for thirty years and the latter for thirteen years, and as such are well informed as to the nature and character of the diseases incident to that country and climate. I hereby further depose that it is a well-known fact to the medical profession that fever contracted in the swamps of that State always leaves the constitution, should the patient recover, more or less impaired; and that rheumatism, pleurisy, and other kindred diseases frequently result therefrom.

The Hon. J. T. S. Houghton, judge of the county court, certifies, under seal, to his personal knowledge of the above-named affiants, as highly credible persons.

It is in evidence that the petitioner, Mary B. Kirby, was married to the said Major Kirby on the 22d day of December, 1831, as shown by a marriage-bond of that date, and the testimony of M. Gretter and Jane K. Peake filed before the committee, who were eye-witnesses to the ceremony.

It is also in evidence that at the time of the death of the said Major Kirby, his widow, the petitioner, was left with the care of five children, helpless and dependent. That she has not since remarried, but has remained a widow from the period of his death to the present time; that she is now, in her declining years, at the advanced age of sixty-six, in a needy condition and without means of support save a pension of eight dollars per month, which was granted her under the act of March 9, 1878, for services of her husband during the war of 1812, and which is totally inadequate to her support.

The pension laws governing this case are as follows:

Section 4732, Revised Statutes of the United States, is as follows:

The widows and children under sixteen years of age of the officers, non-commissioned officers, musicians, and privates of the regulars, militia, and volunteers of the war of 1812, and the various Indian wars since 1790, who remained at the date of their death in the military service of the United States, or who have received an honorable discharge and have died or shall hereafter die of injury received or disease contracted in the service and in the line of duty, shall be entitled to receive half the monthly pay to which the deceased was entitled at the time he received the injury or contracted the disease which resulted in his death. But no half-pay pension shall exceed the half pay of a lieutenant-colonel, and such half-pay pension shall be varied after the 25th day of July, 1866, in accordance with the provisions of section 4712 of this title.

Section 4712 of the Revised Statutes, to which the foregoing alludes, is as follows:

The provisions of this title in respect to the rates of pension to persons whose rights accrued since the 4th day of March, 1861, are extended to pensioners whose right to pension accrued under general acts passed since the war of the Revolution and prior to the 4th day of March, 1861, to take effect from and after the 25th day of July, 1866; and the widows of Revolutionary soldiers and sailors receiving a less sum shall be paid at the rate of eight dollars per month from and after the 27th day of July, 1868.

Under the provisions of the foregoing acts, had the petitioner made proper application, she would have been entitled to a half-pay pension of a captain of artillery, which at the time of the death of the husband of the petitioner was as follows, as appears from a statement of the Second Auditor of the Treasury Department, to wit:

It appears from the books of the Second Auditor of the Treasury Department that the late Capt. R. M. Kirby, First Artillery, received as pay and emoluments for the

month of September, 1842, being the month immediately prior to his death, the sum of \$143.50.

This statement bears the signature of the Second Auditor, and is among the papers filed with the committee. Thus it appears she would have been entitled to a half-pay pension of \$71.75 per month, from the month of September, 1842; but having failed to make such application, she is barred by the provisions of section 4713, which provides—

That in all cases in which the cause of disability or death originated in the service prior to the 4th day of March, 1861, and an application for pension shall not have been made within three years from the discharge or death of the person on whose account the claim is made, or within three years of the termination of a pension previously granted on account of the service and death of the same person, the pension shall commence from the date of filing, by the party prosecuting the claim, the last paper requisite to establish the same. But no claim allowed prior to the 6th day of June, 1866, shall be affected by anything herein contained.

And also by the provisions of section 4 of the act approved March 9, 1878, amending the laws granting pensions to the soldiers and sailors of the war of 1812, and their widows, and for other purposes, which provides as follows:

That all applications for pensions of the classes provided for in this act heretofore, or which may hereafter be made, shall be considered and decided as though made under this act.

Thus the petitioner is unable to avail herself of the provisions of laws that would have given her the relief she prays for in the bill now before the committee had she made proper application.

It is in evidence from the petition of the claimant that the laches were occasioned by the following causes, to wit:

Your petitioner has for years been trying to get the justice now asked; but owing to the death of several who had charge of the matter, and the loss of her important papers, and other consequent impediments, and the late war, and all its troubles and obstacles, she has never had a hearing by any Pension Commissioner or committee of Congress. \* \* \* That many of her papers were mislaid and lost since 1853 until the month of March, 1878, which facts she states to remove all prejudice against her claim because of delay which she could not possibly avoid nor overcome.

The petitioner thus appeals to Congress as the only means of relief, and the committee, in view of all the facts in the case, and the foregoing testimony, and the peculiar hardships it presents, and in view of the advanced age of the claimant and the distinguished services of her husband, who for more than thirty years was actively engaged, with signal ability, courage, and patriotism, in the military service of his country, during which he sacrificed his life, and left the petitioner a widow with the care of five helpless and dependent children, whom she raised and supported without aid from the government, although clearly entitled to the same, and in view of her present needy condition, are of opinion that the evidence is such as to establish her claim upon the government for relief, and they therefore report to the House the accompanying bill, and recommend the passage of the same.

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